

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DELFINO M. GARCIA
Claimant

VS.

ADM FARMLAND
Respondent
Self-Insured

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Docket No. 1,007,078

ORDER

Claimant requests review of a April 16, 2003, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ denied claimant's request for preliminary benefits after determining the results of a drug screen test were admissible. The ALJ found respondent had established there was probable cause to believe the claimant used, had possession of, or was impaired by drugs or alcohol while working.

The claimant requests review and argues the ALJ erred in determining the claimant's drug screen test results were admissible pursuant to K.S.A. 44-501(d)(2)(A). Respondent argues that the urinalysis test was taken because it was required by respondent's mandatory testing policy and, in addition, the testimony establishes probable cause.

In his brief, the claimant argued that the employer's suspicion that claimant had used, or was under the influence of drugs on the accident date was not reasonable and did not rise to the level of probable cause to believe claimant was impaired. Furthermore claimant challenges the chain of custody of the urine sample. Consequently, claimant argues that the drug screen test results are not admissible.

The issues on this appeal are whether the results from the drug screen test are admissible, and if so, did drug use contribute to claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is undisputed that claimant was injured at work on June 24, 2002, when he fell from a ladder. What is disputed is whether claimant was impaired by drugs at the time and whether that impairment caused or contributed to his accident.

A urine sample was taken from claimant at the Minor Emergency Center Northeast in Wichita, Kansas. The sample was then screened for drugs.

The ALJ concluded the urinalysis test results were admissible because there was probable cause to believe the claimant used or had possession of or was impaired at the time of the accident.

The Workers Compensation Act severely restricts the admission of drug screen test results. The Act provides that six factors must be proven before drug test results can be admitted into evidence.¹

- (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
- (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
- (C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
- (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
- (E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

¹ K.S.A. 44-501(d)(2).

- (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

The Workers Compensation Act does not define probable cause. But the Board has determined the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.²

The Workers Compensation Act requires a definite foundation be laid before the results of a chemical test are admissible into evidence.³ Therefore, there exists a question of fact whether that foundation has been laid. In this case, the ALJ found the respondent had established probable cause to believe that the claimant used, had possession of, or was impaired by the drug at the time of the work-related accident. Accordingly, the ALJ admitted the test results into the evidentiary record over claimant's objection. Claimant argues this was error. Before the Board can consider the merits of the question regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding.⁴

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a or the ALJ must have exceeded her jurisdiction as required by K.S.A. 44-551. The jurisdictional issues listed in K.S.A. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the issue now before the Board is not one listed in the preliminary hearing statute, the question become whether the ALJ exceeded her jurisdiction.

As with other evidentiary questions at preliminary hearing, the ALJ is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature. The Board finds an administrative law judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence.

² See *Evans v. Frakes Trucking*, 31 Kan. App. 2d 211, 64 P.3d 440 (2002).

³ See K.S.A. 44-501(d)(2).

⁴ See *Anderson v. Bill Morris Construction Co., Inc.*, No. 213,350, 1999 WL 374037 (Kan. WCAB May 24, 1999).

The Board finds the ALJ did not act arbitrarily or capriciously in her admission of the proffered documents and, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen result.

The claimant may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

But the second part of claimant's issue on appeal, whether his drug use contributed to his injury, is jurisdictional because it goes to the respondent's defense against the compensability of this claim. Therefore, after considering the mechanism of injury, being mindful of the positive drug test result and the statutory presumption of impairment, the Board concludes it is more probable than not that claimant's injury was contributed to by his drug use.

Award

WHEREFORE, the Appeals Board finds that Administrative Law Judge Nelsonna Potts Barnes' April 16, 2003, Order should be and is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

BOARD MEMBER

c: Randy L. Stalcup, Attorney for Claimant
Charles W. Hess, Attorney for Respondent and Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director